

No. 13-16105

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA FOREST LEGACY, *et al.*,
Plaintiff-Appellants

v.

ROBERT BONNIE,
in his official capacity as Under Secretary of Agriculture, *et al.*,
Defendant-Appellees

and

AMERICAN FOREST AND PAPER ASS'N, *et al.*,
Defendant-Intervenor-Appellees

On Appeal From an Order of the United States District Court
for the Eastern District of California
No. Civ. S-05-0205 MCE/GGH

SETTLEMENT AGREEMENT

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The Parties to this action, Plaintiff-Appellants Sierra Forest Legacy, Natural Resources Defense Council, Center for Biological Diversity, Sierra Club, and The Wilderness Society (collectively, “Legacy”) and Defendant-Appellees Robert Bonnie,¹ in his official capacity as Under Secretary for Natural Resources and Environment, United States Department of Agriculture, Tom Tidwell, in his official capacity as Chief of the United States Forest Service, Randy Moore, in his official capacity as Regional Forester, United States Forest Service Region 5, and Earl Ford,² in his official capacity as Forest Supervisor, Plumas National Forest (collectively, the “Forest Service”), by and through their undersigned counsel of record, hereby agree to the following Settlement Agreement in order to resolve this action and avoid the need for further litigation before the Court.

WHEREAS:

Legacy filed this lawsuit in federal district court for the Eastern District of California (Case No. Civ. S-05-0205 MCE/GGH) challenging the Forest Service’s adoption of the 2004 Sierra Nevada Forest Plan Amendment (the “2004 Framework”) and certain site-specific logging projects that were consistent with the 2004 Framework.

¹ Mr. Bonnie is automatically substituted for his predecessor, Ann Mills, pursuant to Federal Rule of Civil Procedure 25(d).

² Mr. Ford is automatically substituted for his predecessor, Alice Carlton, pursuant to Federal Rule of Civil Procedure 25(d).

By order dated August 1, 2008, the district court granted in part and denied in part Legacy's motion for summary judgment. *Sierra Nevada Forest Prot. Campaign v. Rey*, 573 F. Supp. 2d 1316, 1347-48 (E.D. Cal. 2008). In a subsequent order on remedy dated November 3, 2009, the district court denied Legacy's request for injunctive relief, ordered the agency to prepare a supplemental environmental impact statement ("EIS") for the 2004 Framework, ordered the agency to conduct additional National Environmental Policy Act analysis for certain projects, and remanded the matter to the Forest Service. *Sierra Forest Legacy v. Rey*, 670 F. Supp. 2d 1106 (E.D. Cal. 2009).

Legacy appealed the district court's August 1, 2008 and November 3, 2009 orders, and the Ninth Circuit Court of Appeals issued an opinion on May 26, 2011, reversing in part and affirming in part. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161 (9th Cir. 2011).

On remand from the Ninth Circuit's May 26, 2011 order, the district court granted Legacy's stipulated request to dismiss its claims under the National Forest Management Act by order dated February 7, 2012. (ECF 337). By subsequent order dated April 15, 2013, the district court denied Legacy's request for injunctive relief and ordered the agency to prepare a supplemental environmental impact statement for the 2004 Framework. *Sierra Forest Legacy v. Sherman*, 951 F.

Supp. 2d 1100 (E.D. Cal. 2013). The Forest Service completed a supplemental EIS on August 30, 2013.

Legacy filed the instant appeal of the district court's April 15, 2013 order on May 29, 2013. Subsequently, the parties entered into the Ninth Circuit's mediation program, and have agreed to a stay of Legacy's appeal while the parties have engaged in productive settlement discussions.

NOW THEREFORE,

The parties have reached an agreement for informal resolution of this matter, and hereby agree and stipulate as follows:

Pacific Fisher

1. The Forest Service agrees that it will not issue a draft environmental impact statement ("DEIS") for the revised forest plans for the Sierra, Sequoia, and Inyo National Forests (the "Southern Sierra Forests") until after the completion of the conservation strategy for the Pacific fisher (*Martes pennanti*) that is currently in progress with Conservation Biology Institute as the lead. ("Fisher Conservation Strategy").

2. The Forest Service agrees that the DEIS for the Southern Sierra Forests shall include and analyze an alternative that is consistent with the findings and recommendations set forth in the Fisher Conservation Strategy. For purposes of construing this Settlement Agreement only, determining whether the alternative

described in the prior sentence is consistent with the Fisher Conservation Strategy shall be in the sole discretion of the Forest Service.

California Spotted Owl

3. The Forest Service agrees to complete a conservation strategy for the California Spotted Owl (*Strix occidentalis occidentalis*) ("CASPO Strategy") by March 31, 2016, in collaboration with experts on the California spotted owl, fire ecology, and forest ecology. The Forest Service retains the discretion to select the experts described in the prior sentence and determine the scope of the CASPO Strategy, provided that (1) the Forest Service provides Legacy with advance notice of the experts the Forest Service intends to select and the scope of the CASPO Strategy, and (2) the Forest Service provides Legacy with a reasonable amount of time to respond in writing to the Forest Service's selections and scope.

4. Pending completion of the CASPO Strategy and within sixty (60) days of the effective date of this Settlement Agreement, the Forest Service agrees to select and contact experts of its choosing on the California spotted owl, fire ecology, and forest ecology, to develop interim recommendations on changes to forest management. The Forest Service retains the sole discretion to select the experts described in the prior sentence and to determine the scope of work, provided that (1) the Forest Service provides Legacy with advance notice of the experts the Forest Service intends to select and scope of work, and (2) the Forest

Service provides Legacy with a reasonable amount of time to respond in writing to the Forest Service's selections and scope of work.

5. The Forest Service agrees that the DEIS for the Southern Sierra Forests shall include and analyze an alternative that is consistent with the interim owl recommendations described in paragraph 4. To this end, the Forest Service agrees that it will not issue a DEIS for the Southern Sierra Forests until the Forest Service (1) receives the interim owl recommendations described in paragraph 4, (2) solicits feedback from the experts who provide the interim owl recommendations described in paragraph 4 regarding the alternative's consistency with the interim owl recommendations, and (3) provides the experts with an opportunity to respond to the request for feedback. Notwithstanding the above, if some of the experts from whom interim owl recommendations are solicited have not responded by December 31, 2014, nothing in this Agreement shall prohibit the Forest Service from issuing a DEIS for the Southern Sierra Forests after that date.

6. For purposes of construing this Settlement Agreement only, determining whether the alternative described in the prior paragraph is consistent with the interim owl recommendations shall be in the sole discretion of the Forest Service.

7. The Forest Service agrees that any environmental impact statement or environmental assessment prepared for a site-specific, vegetation management

project within the range of the California spotted owl in the Sierra Nevada National Forests, for which public notice of scoping is published after receipt of the recommendations described in paragraph 4, shall include and analyze an alternative consistent with (a) the recommendations described in paragraph 4 or (b) the final CASPO Strategy. The Forest Service shall retain the sole discretion to determine: 1) whether a project is a "vegetation management" project; and 2) whether the alternative described in the prior sentence is consistent with the interim recommendations or final strategy. The Forest Service's duty to consider an alternative consistent with the interim recommendations or final strategy shall not last beyond 1) 3 years from the date this Agreement is signed, or 2) a change to the legal status of the species (for example, if the species is listed under the Endangered Species Act).

Complex Early Seral Habitat

8. The Forest Service agrees that the DEIS for the Southern Sierra Forests shall include and analyze an alternative that establishes plan components for post-fire, complex early seral habitat. These plan components would include desired conditions and strategies, as well as standards/guidelines, for conserving the key characteristics associated with the ecological integrity of this habitat type.

Managed Fire

9. Within twelve (12) months of the effective date of this Settlement Agreement, the Forest Service and Legacy agree to prepare a memorandum of understanding (“MOU”) to support the increased application of managed fire for ecological benefit and to support the following objectives:

- Engagement of a variety of stakeholders, including, but not limited to, the National Park Service, CalEPA, State of California (Resources Agency, air boards), and non-government organizations;
- Reduction in barriers to implementing managed fire by improving smoke management coordination and engaging in public education and outreach; and
- Increasing capacity to implement managed fire through expanded training opportunities and resource sharing.

2004 Framework

10. Legacy agrees that it shall not bring any new legal action challenging the adequacy of the 2004 Framework or its National Environmental Policy Act analysis, including the supplemental environmental impact statement ordered by the district court’s April 15, 2013 order and completed on August 30, 2013.

11. Notwithstanding paragraph 10 above, the Forest Service agrees that nothing in this Settlement Agreement limits or waives Legacy's right to appeal or seek judicial review of any revised or amended forest plan, site-specific project, or other final agency action on any other legal or equitable grounds.

Additional Terms

12. The terms of this Settlement Agreement shall become effective upon the date the counsel of record for the last Party signs the Settlement Agreement.

13. Within 14 days of the effective date of this Settlement Agreement, Legacy will voluntarily dismiss the above-captioned appeal. Dismissal shall be with prejudice, except that pursuant to Ninth Circuit General Orders, Appendix A(45), dismissal shall be without prejudice to reinstatement of the appeal as specified below.

14. Pursuant to Ninth Circuit General Orders, Appendix A(45), Legacy shall be entitled to move for reinstatement of the above-captioned appeal if the Forest Service fails to act in accordance with paragraphs 1 through 11. Legacy shall not be entitled to reinstate its appeal on the grounds that it objects to the contents of any recommendation, conservation strategy, or update to any recommendation or conservation strategy contemplated by this Settlement Agreement.

15. In the event that the Ninth Circuit Case is reinstated, the Parties agree that the Settlement Agreement shall not be used as evidence in the litigation. The Parties agree that Legacy and Federal Defendants shall each bear their own attorneys' fees, costs, and expenses for the above-captioned appeal up to the effective date of the Settlement Agreement, and all prior proceedings in the district court and the Ninth Circuit. The Parties further agree that no Party may seek reimbursement or an award of attorneys' fees, costs, or expenses for the enforcement of this Settlement Agreement, nor for time spent in connection with implementation of the Settlement Agreement. Nothing in this Settlement Agreement prevents any claims for attorneys' fees and costs in this matter in the event that the Settlement Agreement is not fully implemented and Legacy elects to pursue the appeal. If either Party breaches their respective obligations in this Settlement Agreement, that Party agrees not to seek fees or costs if the appeal is reinstated.

16. This Settlement Agreement is the result of compromise and settlement and does not represent an admission by any Party to any fact, claim, or defense in any issue in this lawsuit.

17. No provision of this Settlement Agreement shall be interpreted or constitute a commitment or requirement that Federal Defendants obligate or pay

funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable appropriations law.

18. The Parties agree that in no event shall any Party seek an order of contempt nor shall any Party be entitled to monetary damages for breach of this Agreement. In addition, before seeking any relief for breach of this Agreement, the Parties agree to provide written notice of any dispute as to compliance with this Agreement to the other Party prior to seeking relief from the court, and both Parties must make a good faith effort to resolve the dispute informally within 60 days after the written notice ("dispute resolution period"). In the event the Parties are not able to resolve the dispute within the dispute resolution period, Legacy may within 28 days after the dispute resolution period reinstate its appeal pursuant to Ninth Circuit General Orders Appendix A(45). If the Forest Service fails to comply with any obligation in paragraphs 1-11 and Legacy fails to reinstate its appeal within the time-frames contemplated by this paragraph, Legacy may not reinstate its appeal or seek any other remedy for breaches of this agreement unless Legacy and the Forest Service amend this agreement in writing as contemplated by paragraph 21.

19. This Settlement Agreement shall be governed and construed under federal law.

20. Nothing in this Settlement Agreement requires the Forest Service to take any action or conduct any analysis, except as specifically set forth in the terms

of this Agreement. For example, the Agreement does not 1) require the Forest Service to revise or amend any Forest Plan upon the completion of any of the wildlife conservation strategies described in this Agreement, or 2) require the Forest Service to conduct any analysis or process pursuant to the National Environmental Policy Act upon the completion of any of the wildlife conservation strategies described in this Agreement, except as specifically provided for in the Agreement.

21. This Settlement Agreement is intended to be for the benefit of the Parties only. The Parties do not release any claims against any other person or entity not expressly released by this Settlement Agreement. Nothing in this Settlement Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement.

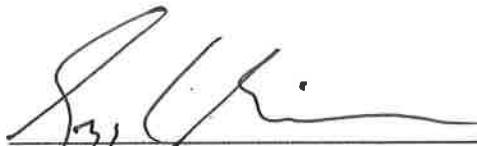
22. This Settlement Agreement contains all of the agreements between the Parties. The Parties agree that any other prior or contemporaneous representations or understandings not explicitly contained in this Settlement Agreement, whether written or oral, are of no further legal or equitable force or effect. Any subsequent modifications to this Settlement Agreement must be in writing, and must be signed and executed by the counsel of record for the Parties.

23. The undersigned representatives of the Parties certify that they are fully authorized by the respective Parties whom they represent to enter into the

terms and conditions of this Settlement Agreement and to legally bind such Parties to it.

24. Signature on a counterpart or authorization of an electronic signature shall constitute a valid signature.

DATED: Oct. 9, 2014



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